No. 57.

Reply Brf. of Chaney for Appt.

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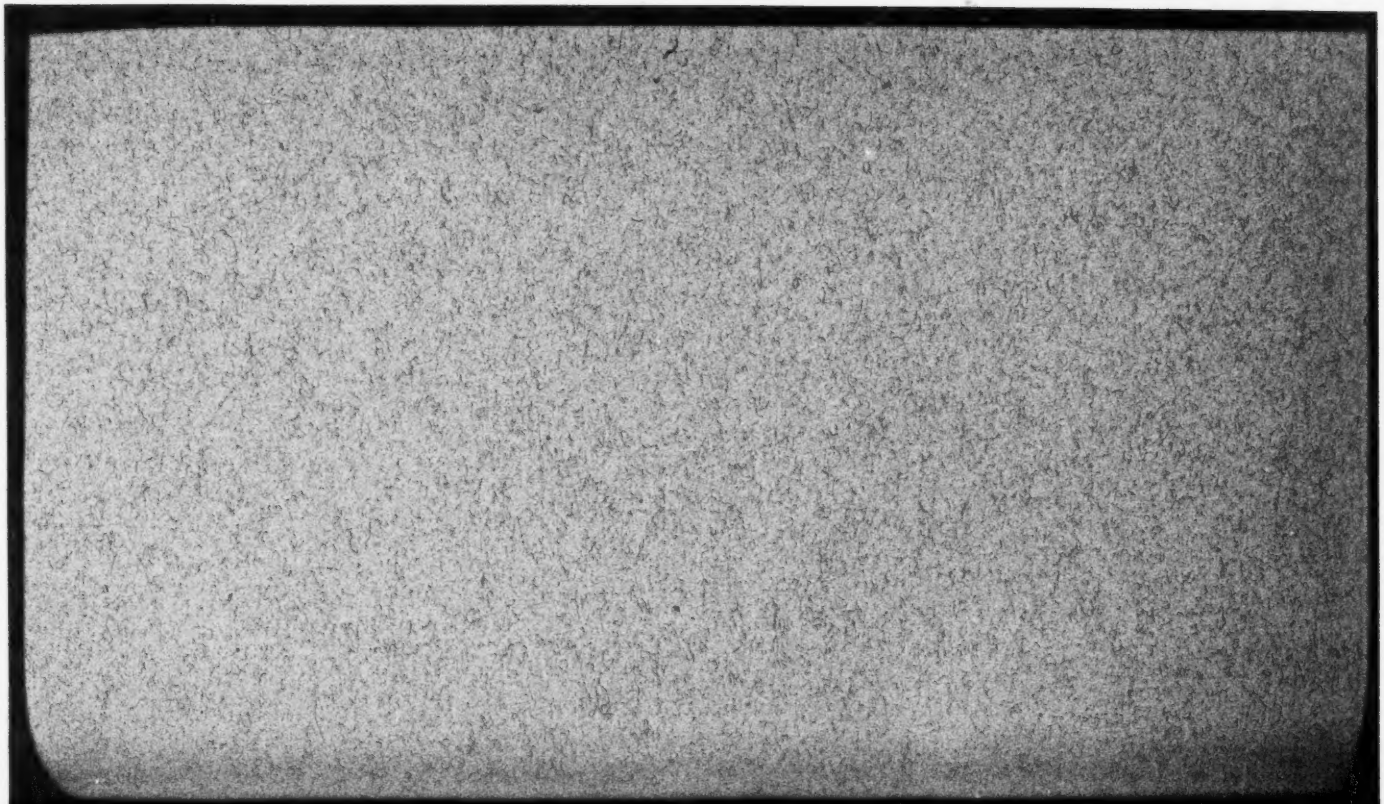
MORRIS KEIM
vs.
THE UNITED STATES. } No. 57.

APPELLANT'S BRIEF IN REPLY TO BRIEF OF APPELLEE.

JOHN C. CHANEY,
For Appellant.

February 19, 1900.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

MORRIS KEIM,

vs.

THE UNITED STATES.

No. 57.

APPELLANT'S REPLY BRIEF.

Appellant does not seek to control executive discretion.

Congress controls executive discretion by the Civil Service law, as to everybody in the Civil Service; and as to honorably discharged soldiers and sailors, in the Civil Service, by the Act of August 15, 1876 (Supp. R. S. U. S., Vol. 1, 120).

Appellant seeks the protection of these solemn acts of the law making power.

To say that Congress cannot do this is to say that the creature is greater than his creator.

Has Congress done this? It is certain that Congress intended to do it.

When Congress said that honorably discharged soldiers and sailors must be retained in making *any* reduction of force in the Executive Departments, it said what it meant and meant what it said. The soldiers and sailors of the Union had made it possible for a Governmental Civil

Service, and it was determined that wherever they were found in the employment of the government they should have the favor of permanent positions.

The Constitution of the United States, in Article 2, provided:

"He (the President) shall, etc., but the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

The Constitution first points out what positions may be filled by the President by and with the advice and consent of the Senate, but there are a great many inferior officers needed to attend to the business affairs of the United States Government and the Constitution says that Congress may vest the appointment of them in the "President alone, in the courts of law or in the heads of departments."

Congress may select either one of the three or may place the power to appoint such inferior officers in him or any one of the three mentioned and ignore the other two entirely.

For instance, the power to appoint the clerk of a United States Court has been placed, by Congress, in the judge or judges thereof. Congress may remove the power from those and place it in the President or the Attorney-General or the head of a department.

Congress where it has exercised that power of designating who shall appoint and is silent about removal, then the power of removal is incident to the power of appointment, but no one will dispute the proposition that as Congress has the power to say who shall appoint, it clearly has the power to say how that power of appointment shall be exercised.

All power in the matter is derived from the law; then, it follows, that the law must be followed in all things limiting as well as enlarging their power.

We cite the action of the last Congress as strong proof of this position. Heretofore, the grade of a post office clerk and the salary he shall receive has been subject to the discretion of the First Assistant Postmaster General.

In the re-adjustment of the salaries of the clerks in the Post-Office Department, a new condition of affairs was confronted. The bill fixed a given number of each of the various grades which cannot be increased or diminished, they are put on the same footing as letter carriers, their grade or salaries cannot be changed by the will or caprice of the head of a department. Why? Because Congress has expressed its power given to it by the Constitution to regulate such "inferior officers" by giving express directions in the matter.

In this case, the power of removal by the President or whether Congress can restrict that power does not arise. This is a case under the first clause of the Section of the Constitution referred to that relates to "inferior officers."

"We have no doubt when Congress by law vests the appointment of inferior officers in the heads of Departments that it may limit or restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to *thus vest* the appointment implies authority to *limit, restrict* and *regulate* the *removal* by such laws as Congress may enact in relation to the officers so appointed."

United States *vs.* Perkins, 116 U. S., page 483.

"The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress and by such legislation *he must be*

governed, not only in *making appointments* but in all that is *incident thereto.*" *Ibid.*

Was ever a principle stated more tersely? The head of a department is a creature of Congress—would not have a being without Congress; and can be wiped out at any time. Now is it to be said, that the creator cannot say what powers the creature has?

In the case of the suit for reinstatement of a discharged policeman, against the Board of Safety of Indianapolis, Indiana, in the Superior Court there recently, Judge Carter said:

"Whenever the holding is made to depend on anything other than the mere pleasure of the appointing power, then I think it may be said that its duration is declared by law." * * *

"While it may not be clear that the duration of the term of office is declared in the law, it is at least a matter of doubt as to whether it is not so declared, and under this view of the law, it is my duty to hold that the term of the office of policemen is declared in the charter, and that members of the police force are not subject to removal at the mere pleasure of the appointing power. * * * And I am the more inclined to such conclusion when, by so doing, I am enabled to uphold an act of the Legislature, when to hold otherwise would be to strike down one of the important reforms intended to be established by the enactment of the charter." * * *

Merit is the object sought. Appellant was appointed on his merit. As an honorably discharged soldier Congress said he posseses merit. Upon this merit Congress, by the Act of August 15, 1876, said he *shall be retained* in the Civil Service to which he was appointed.

It is not, therefore, a question of the jurisdiction of the court below to pass upon the judgment of the Secretary of the Interior as the Attorney-General insists. Congress

has said, as appellant understands it, that the Secretary of the Interior shall not pass upon the qualification of his employees, but that the Civil Service Commission shall do this.

The Civil Service Commission found appellant competent to discharge the duties of his office, and the Secretary of the Interior accepted him as a competent person.

Then, Congress said that the employee *must be retained* in his office, if he be an honorably discharged soldier or sailor, if there is work for him to do.

Under these laws, as to the right of appellant to his office, the Secretary of the Interior has no "discretion".

The Court of Claims was not, therefore, asked to pass upon the "discretion" of the Secretary.

Congress created the Secretary of the Interior and it can and does control his office by the passage of laws applicable thereto.

The Court will not be misled by this pretended "interference with executive discretion". Laws are made for the protection of the rights of the citizen, primarily. It is the duty of the executive to enforce the law,—not seek to supplant the law by "executive discretion".

Appellant has sued for his rights under laws of Congress which have received executive approval; and by solemn oaths the executive is bound to enforce, rather than evade, them.

Mr. Pendleton's remarks on the Civil Service bill, before Congress, is helpful here only to show that there was nothing in the "proposed bill" to prevent the executive making discharges at his volition, and that is true. But when Congress passed the Act of August 15, 1876, above referred to, a law was enacted, with reference to honorably discharged soldiers and sailors, which placed against the executive the prohibition which was not included in

the Civil Service Act. Appellant claims the benefit of these two Acts of Congress taken together.

He has a right to invoke these laws; and, in doing so, he does not seek to "destroy discipline," nor to interfere in any way with the just administration of the laws by which the executive is governed, but rather to support discipline in the due administration of the laws.

The Attorney-General misstates the case. Congress has declared that the Executive Departments shall not determine the qualification of their employees, and that they shall not discharge an employee who was honorably discharged from the military or naval service.

The execution of these laws is the thing for which appellant prays.

Congress has stricken out the exercise of the will and caprice of the executive officer to discharge an ex-soldier or sailor, and says that the power to discharge such persons from the Civil Service, as heretofore, is hereby abrogated from executive discretion. And, then to remove the last chance for the invocation of executive judgment the Civil Service law established a Commission to determine competency. This law is constitutional. It says that executive judgment shall be controlled in making appointments; and the Act of August 15, 1876, as to soldiers and sailors controls executive judgment as to removals.

Appellant holds that these laws govern the Secretary of the Interior; that he is without discretion in the matter.

The Hennen case, cited by appellee, cannot apply here, because that case was one in which the President was unrestricted in appointment and also unrestricted in the removal of the officer.

The Parsons case also cited by appellee was of like character.

The case of Boynton against Blaine, 139 U. S., 306, was a case where the executive discretion was sought to be controlled by the court, under the guise of the enforcement of a ministerial duty. So are also the other cases cited in appellee's brief, page 11.

As appellant is pursuing a case wherein the executive discretion has been eliminated by Congress, these cases are not helpful or applicable.

Justice Bradley, in the case of Pulaski *vs.* Lyman, cited at page 12, of appellee's brief, decided that the naked Civil Service law did not prohibit the discharge of a Civil Service employee at the discretion of the Executive. Had Pulaski been an honorably discharged soldier or sailor, and had Judge Bradley been considering the Act of August 15, 1876 in connection with the Civil Service Act, he would, probably, have rendered a different opinion.

Neither did Judge Kilpatrick have before him such a case as this when he decided Page et al. *vs.* Moffatt, 85 Fed. Rep. 38.

The statements quoted from Judge Kilpatrick's opinion, at page 12 of appellee's brief, wherein he refers to the "breaking down of all discipline in the administrative departments of the government," might be answered by saying that discipline is best preserved by the strict and honest observance of the laws which are passed for the guidance of the administrative department of the government. If the Secretary of the Interior had observed the laws under which appellant's rights are supposed to be protected he would have gone a long way toward the preservation of executive discipline.

When the law officers of the government are without law or logic they usually fall back under the petticoats of executive discretion and there seek to hide their fallacies and errors.

Executive discipline was not fractured when Congress took away from executive officers of the government the right to appoint to civil offices whom they should choose. It was then thought the free exercise of executive discretion had a tendency to rupture discipline, and damage the good of the service. This was the reason urged for the passage of the Civil Service Act.

It cannot be a very serious breach of discipline to prohibit the discharge of an honorable soldier or sailor, competent in the performance of his civil duties.

These men had preserved the union in the great life and death struggle from 1861 to 1865, and Congress having such a high appreciation of them, determined that the departmental discipline would be promoted by their permanent retention in office, and so passed the Act of August 15, 1876.

They conquered peace; they restored discipline; they are worthy of true discipline. This law took away the executive discretion and the Secretary of the Interior did an unlawful thing when he discharged appellant from his office in 1894.

Appellant does not war against executive discretion. He seeks to enforce a plain law of Congress which was enacted to secure his tenure of office.

He was competent to discharge his duties. The Civil Service Commission said so. Judge Peelle, in his dissenting opinion says so, and the majority of the court does not find differently. The endorsement on the back of the discharge "because of his rating as inefficient" was put there subsequent to his discharge, and was done solely to evade the letter of the law.

This is the suit of an honest, capable, and worthy ex-Union soldier seeking his rights under the plain laws of Congress.

The Attorney-General raises a new point, as to the meaning of a "reduction of force" in the Act of August 15, 1876. He technically urges that the force was not reduced.

On the trial of the case below, appellant sought to show that there was work in the Pension Office for him to do, believing that this was an essential fact, in order that he show an improper discharge. He also showed that others not soldiers or sailors were appointed and promoted to do his work, in order that the court might be convinced that he was really needed in the Civil Service in which he was engaged.

It is now sought to distort this into a belief that the force was not reduced, so as to avoid, if possible, even the benefit of the Act of August 15, 1876, that is to say—unless appellant has shown that there was an absolute and unqualified reduction of the force through which he lost his place, this act does him no good.

This is very unfair. "Any reduction of force" means and includes the discharge of one man, we submit.

The Attorney-General may intimate that appellant was of no account, and therefore, the force was not reduced by his discharge. But this position is not a worthy one, and will not be taken seriously.

When a single soldier falls in battle there results a "reduction of force." When a clerk is discharged from civil duty the "force" is also reduced. There may be an appointment or a promotion to the vacancy thus caused, the same day or the day after, but the fact is the force was reduced by said discharge and a filling of the vacancy proves it.

If no better objection than this can be urged to appellant's case, we shall certainly stand with confidence before the court and ask that the Court of Claims be reversed.

The question in the case is, therefore, we respectfully submit:

Whether a law of Congress which controlls executive discretion can be enforced.

Appellant has confidence in the power and disposition of the court to enforce the act of August 15, 1876 in connection with the Civil Service Act, for this court has declared the constitutionality of the Civil Service Act of 1883, in decisions so fresh that they need not be here cited.

Respectfully submitted,

JOHN C. CHANEY,
Appellant's Attorney.

WASHINGTON, D. C.
February 19, 1900.